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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FRANK W. and LORNA D. STAMOS,

Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Frank W. and Lorna D. Stamos
In Their Own Persons
1115 S. Church Street
Lodi, California 95240
(209) 334-5724

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135 pp

QUESTIONS PRESENTED

1. Whether or not it is within the propriety of the Appeals Court to act as a trial level court by considering and ruling upon appellee's non-jurisdictional arguments first raised in the appeal process, where the issue was not made a part of the opinion appealed from?

2. Whether or not the Respondent or his counsel worked a fraud upon the petitioners and the courts below to influence decision?

3. Whether or not it is within the propriety of the Appeals Court to affirm an action by a federal agency which expressly declares executive autonomy from important Acts of Congress?

4. Whether or not it is an abuse of the Courts discretion to tacitly affirm a federal agency opinion that an irrelevant Treasury Department Order was used as the alleged duly delegated authority which vests appellee with the authority to determine tax deficiencies and penalties against appellants?

5. Whether or not it is within the propriety of the Appeals Court to rule on evidence never served upon appellant and then withhold such evidence when disclosure is requested?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption.

Petitioner:

FRANK W. AND LORNA D. STAMOS

In their own person

Petitioner/Appellant below

Respondent:

COMMISSIONER OF INTERNAL REVENUE

Respondent/Appellee below

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No.

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM 1992

FRANK W. STAMOS AND LORNA D. STAMOS,

Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Frank W. and Lorna D. Stamos, respectfully petitions the Supreme Court of the United States of America that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Ninth Circuit, entered March 4, 1992, in the above entitled proceeding, to review the denial of the Petition for Rehearing on May 14, 1992, and to review the possibility that respondent has worked a fraud upon the courts below.

OPINIONS BELOW

The Memorandum Opinion of the Ninth Circuit Court of Appeals, issued March 4, 1992, is retyped in Appendix A.

The United States Tax Court Opinion of December 12, 1990, is retyped in appendix B.

The denial of the Petition for Rehearing by the Ninth Circuit Court of Appeals, issued May 14, 1992, is retyped in Appendix C.

JURISDICTION OF THIS COURT

We invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). The final judgment of the United States Court of Appeals for the Ninth Circuit was dated and entered on May 14, 1992. This Petition was filed within 90

days of that date under Rule No. 13 of Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution.

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

5 U.S.C. §§ 552(a)(1)(B) - (a)(1)(E)

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public ——

* * *

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

* * *

(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published....

26 U.S.C. REFERENCES ARE 1984 AND PRIOR

26 U.S.C. § 6020(b)

(b) EXECUTION OF RETURN BY SECRETARY.——

(1) AUTHORITY OF SECRETARY TO EXECUTE RETURN.——If any person fails to make any return (other than a declaration of estimated tax required under section 6015) required by internal revenue law or regulation made thereunder at the time prescribed therefor, or makes willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

26 U.S.C. § 6153

INSTALLMENT PAYMENTS OF ESTIMATED INCOME TAX BY INDIVIDUALS.

26 U.S.C. § 6154.

INSTALLMENT PAYMENTS OF ESTIMATED INCOME TAX BY CORPORATIONS.

26 U.S.C. § 6201(b)(1)

(b) AMOUNT NOT TO BE ASSESSED.——

(1) ESTIMATED INCOME TAX.——No unpaid amount of estimated tax under section 6153 or 6154 shall not be assessed.

26 U.S.C. § 6601(h)

(h) EXCEPTION AS TO ESTIMATED TAX.——This section shall not apply to any failure to pay estimated tax required by section 6153 or section 6154.

26 U.S.C. § 6651(d)

(d) EXCEPTION FOR DECLARATIONS OF ESTIMATED TAX.——This section shall not apply to any failure to file a declaration of estimated tax required by section 6015 or to pay any estimated tax required to be paid by section 6153 or 6154.

26 U.S.C. § 6653(a)(2)

(a)(2) ADDITIONAL AMOUNT FOR PORTION ATTRIBUTABLE TO NEGLIGENCE, ETC.——There

shall be added to the tax (in addition to the amount determined under paragraph 1)) an amount equal to 50 percent of the Interest payable under section 6601——

26 U.S.C. § 6654(a)

FAILURE BY INDIVIDUAL TO PAY ESTIMATED INCOME TAX.

(a) ADDITION TO THE TAX.——In the case of any underpayment of estimated tax by an individual,...

28 U.S.C. § 1254(1)

Courts of Appeals; Certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;...

STATEMENT OF THE CASE

Commissioner of Internal Revenue (C.I.R.) determined to assess Frank W. and Lorna D. Stamos for an unpaid amount of estimated income tax and on December 29, 1988, issued same in separate notices.

Petitioners filed timely petitions in the United States Tax Court for Redetermination in abatement under the provisions of Title 26, § 6213(a). The separate petitions challenged the statute validity of the Code sections used in the deficiencies.

The C.I.R. responded, filing answers which denied error in the determination of tax deficiencies for an unpaid amount of estimated income tax. Petitioners Stamos replied, joinding the subject matter issues.

During the course of discovery, respondent C.I.R. refused to cooperate regarding the code sections cited in the deficiency

notices, but rather pressed to re-set or expand the subject matter issues already set by joinder in the pleadings.

Respondent CIR denied erring as regards the code sections used, but never filed an opposition to support their contention. Further, respondent refused to stipulate to the proposed stipulations of petitioners.

At hearing, petitioner Frank W. Stamos spoke without interruption, in some detail, concerning the subject matter issues of the case, despite the fact that prior to the hearing, petitioners prepared and served respondent with a Trial Memorandum clearly describing petitioners position, respondent offered no meaningful oral opposition. Just prior to the hearing respondent served petitioners with a Motion to Dismiss for Failure Properly to Prosecute and for Damages Under I.R.C. Section 6673.

After nine months of deliberation, the Tax Court apparently just closed the petitioned action without reference or comment. The Memorandum Opinion and Order issued only denied the relief sought by petitioners Motion to Dismiss rather than disposing of the subject matter issues raised by the pleadings. Respondent C.I.R. avoided the issues as did the Tax Court.

Petitioners immediately filed a Motion for a Judgment on the Pleadings, which was rejected and returned by the Tax Court.

Using the jurisdiction of the Court of Appeals arising under 28 U.S.C. § 1291, Petitioners appealed to the Ninth Circuit Court of Appeals attempting to remand the case back to the Tax Court for a judgment on the pleadings.

Over the objection of the appellants, the Appeals Court chose to assume the position

of "a trial court" denying appellants request to represent their position by presence and the opportunity to participate in the proceeding with oral arguments.

The Appeals Court then considered the issue, not made a part of the opinion in the court below, and tacitly affirmed the Tax Courts' method of disposing of the pleadings. It must be pointed out here that the Appeals Courts' Memorandum decision is inconsistent with the subject matter issues set by the pleadings.

Prior to the hearing in Tax Court, Petitioners filed a motion to dismiss on the grounds respondent lacked duly delegated authority to determine and issue said deficiencies to the petitioners. The respondent failed to file an opposition brief to the motion to dismiss.

The Tax Court issued a Memorandum Opinion

and Order on the petitioners Motion to Dismiss in favor of respondent.

Petitioners filed a Motion for Reconsideration with respect to the Tax Court's Opinion and Order which was denied.

Petitioners filed a timely notice of Appeal with the Tax Court. One Appeal was made, for a remand concerning the pleadings and the appeal for the Motion to Dismiss.

On May 6, 1991, Appellants Stamos filed an Opening Brief and Excerpts of the Record with the United States Court of Appeals for the Ninth Circuit. Appellee Commissioner of Internal Revenue filed a Brief for the Appellee.

The record will show supplemental briefs and motions filed by the parties and affidavits filed by appellants during the course of the appeal action.

The thrusts of appellants appeal is that

the cited Treasury Department Order No. 120, in the Tax Court Opinion, as the duly delegated authority which authorizes respondent/appellee to determine and send deficiencies to the petitioner/appellants is actually irrelevant to this case.

On March 4, 1992, the Appeals Court issued a Memorandum Opinion affirming the Tax Court findings and sanctioned the appellants for bringing a frivolous appeal. The opinion included both issues; the dismissal of the original pleadings in Tax Court and the Motion to Dismiss.

On March 16, 1992, petitioner/appellants served a Petition for Rehearing which was denied by the Appeals Court on May 14, 1992.

This Petition for Writ of Certiorari will be timely, if filed on or before August 12, 1992.

REASONS FOR GRANTING THE WRIT

First, the petitioned subject matter, relative to explicit statute prohibitions, was never given due process consideration, either in the agencies Tax Court or in the Appeals Court Below.

Congress has simply forbidden the agency to assess for an unpaid amount of estimated income tax. The presence of § 6654(a) of Title 26 shown in the deficiency notice, as being a penalty applied, is evidence that the Commissioner intended to assess petitioners for failure to pay estimated income tax. This evidence is shown in the Petitions filed with the Tax Court (Retyped in Appendix F), also the deficiency notices, the Tax Courts memorandum decision (Retyped in Appendix B). This evidence establishes the deficiencies to be for an unpaid amount of estimated income tax under the provisions

of §§ 6153-6154.

§ 6201(b)(1) of Title 26 is an expressed prohibition against the assessment of the very tax the Commissioner meant to assess in determining the deficiencies to begin with. The prohibiting code section is not just prima facie evidence of the law, it is Public Law enacted by Congress. The United States Constitution at Article VI, Clause 2, numbers such statutes as being the Supreme Law of the Land. The Commissioner, the Tax Court, or the Appeals Court does not seem so impressed.

Further, the Tax Court Memorandum also lists penalties under the provisions of §§ 6651(a)(1) and 6653(a)(2) of Title 26, these penalty sections likewise cannot be applied to any failure to pay estimated tax. See § 6651(d). While §6653(a)(2) shows a 50% interest penalty payable under the

provisions of § 6601, a reading of § 6601(h) also shows an exception as to estimated tax.

Since the purpose of a deficiency and notice is that the Commissioner means to make an assessment, see Barnes v. C.I.R, 408 F.2d 65, 68 (7th Cir. 1969), the deficiency serves no legitimate purpose where an assessment is prohibited by statute from being made. The deficiencies at issue are inconsistent with the law, thus reducing them to the status of bad faith or arbitrary, thus void.

Soon after the Tax Court approved the deficiencies, the agency quickly made an alleged assessment for an unpaid amount of estimated income tax. This act confirms Barnes v. C.I.R., supra, the agency used the deficiencies and the Courts below to defeat an expressed prohibition of Congress. From the very beginning the Commissioner intended

from the very beginning to make an assessment for an unpaid amount of estimated income tax, if this were not true, the deficiency notices would not bear § 6654(a), expressed in Title 26 (Internal Revenue Code) as, "Failure by individual to pay estimated income tax."

During Oral arguments, the petitioners informed the Tax Court of the Commissioners erroneous intention, and also told the Court that the deficiencies were based upon an erroneous view of the law and thus, lacking a legitimate purpose.

This Court has ruled, "Proof that a tax assessment is utterly without foundation is proof that it is arbitrary and erroneous." United States v. Janis, 428 U.S. 433, 49L.Ed 2d 1046, 1048, 96 S.Ct. 3021 (1976). This is such a condition.

"Arbitrary and erroneous", there does not

exist two better words to describe the deficiency notices determined and served upon the Stamoses in this case. An instrument meant to represent a lawful and enforceable document cannot reasonably have a foundation premised upon clearly construed prohibitions enacted into law by Congress.

It is little wonder that the Commissioner failed to bring an argument or to make any attempt at opposing the petitioners argument, either written or oral.

In the Appeals Court, The Commissioner asserted that petitioners challenge of the validity of the notices of deficiency were "frivolous legal theories," and that the reason the Tax Court did not rule on the subject matter of the pleadings, is, "The Tax Court did not find that this argument merited discussion in its opinion."

While the Commissioner and his Tax Court

tacitly just dropped the subject matter issues as established by the pleadings, the Appeals Court reasoned this way: "The notices of deficiency are not based on unpaid estimated taxes, and thus, the Stamoses reliance on section 6201(b)(1) is misplaced." Instead, the CIR computed the Stamoses tax deficiencies using substitute returns pursuant to the statutory authority granted in section 6020(b) of the Code." 9th Circuit Court of Appeals Memorandum Opinion, (Retyped in Addendum A).

Arguendo, for a moment remove 26 U.S.C. § 6201(b)(1) as a statute of prohibition in the appellant's argument. Now let us take a look at the petition that commenced this action, the deficiency notices, the Order and decision of the Tax Court, and even on page 3 of the Brief for the Appellee filed in the Appeals Court, everywhere we see

§ 6654 as a penalty provision for, "Failure by Individual to Pay Estimated Income Tax." How is it that an individual pays estimated income taxes? The answer is § 6153 of Title 26 and then immediately § 6201(b)(1) pops back up and once again is made a part of the action as the statute expressly prohibits the assessment of an unpaid amount of estimated tax under section § 6153.

Within reasoned logic, the only method by which § 6201(b)(1) should disappear, in the action below, is for the deficiencies and all documents made as a result thereof to be abated. The prohibition cloud of § 6201(b)(1) will hang over such a deficiency until it is declared void or the statute is properly repealed by Congress.

This Court has ruled, "Code sections levying taxes cannot be extended beyond the clear import of the language used, or to

enlarge their operations so as to embrace matters not specifically pointed out." Gould v. Gould, 245 U.S. 151, 153.

This Court has also pronounce dictum concerning a general intention of Congress to tax all incomes, but its dictum requires that it be carried into language which can be reasonably construed to effect it. Otherwise, the intention cannot be enforced by the Courts, see Smietanka v. First Trust & Savings Bank, 257 U.S. 602,606.

Below the Tax Court sanctioned petitioners $10,000. and the Appeals Court sanctioned petitioners $1,500. for bringing the argument. This Court should grant the Writ of Certiorari, review the record and then either reverse the decisions below, or remand the issue back for trial.

Secondly, the Courts below ruled upon evidence that was never served upon

petitioner/appellants, namely that the C.I.R. computed the tax deficiencies for the Stamoses using substitute for returns pursuant to § 6020(b) of the Code. Such returns apparently were not entered into the record as evidence in the case below during the course of the litigation. Despite petitioner/appellants request to gain access to this procedural evidence, the Appeals Court below has yet to allow disclosure. See letters of request to the Court, in addendum D.

This new evidence raises a question as to the existence, as evidence, of the alleged returns. If returns were never executed under § 6020(b), respondents' deficiencies are procedural error and respondent has worked a fraud upon the petitioners and the Court for purporting their existence as being valid evidence.

Thirdly, regarding the Motion to Dismiss filed by petitioners prior to trial in the Tax Court below:

The motion challenged the duly delegated authority of the C.I.R. to determine and issue deficiencies against the petitioners who were never noticed, as mandated by law, that the C.I.R. was vested with authority to perform the function of determining and issuing deficiencies specifically against the petitioners.

This Court advises that federal agents may be unaware of the limitations of their authority and that in dealing with federal agencies we must ascertain their authority, see Federal Crop Ins Corporation v. Merrill, 322 U.S. 380, 67 S.Ct. 1.

Petitioners have ascertained that the C.I.R. is acting outside the scope of his duly delegated authority as regards the

action taken against the petitioners which commenced the action below:

Some of the powers vested with Congress by the United States Constitution was redelegated to the executive for the purpose of carrying into effect the business of America. While "Congress can delegate its authority and also delegate the manner in which such authority is to be exercised," see Hotch v. United States, 212 F.2d 280. This dictum in the Court below is upheld by the Administrative Procedures Act of June 11, 1946,(A.P.A.) Chapter 324, 60 Stat 238, which mandated disclosure of public information. The Act strengthened the Federal Register Act of 1935.

However, within 20 years, the Act itself was being used by the executive to justify secrecy about how department heads run their agencies.

To correct this condition, Congress amended the Act on July 4, 1966, Public Law 89-487; 80 Stat 250, and July 5, 1967, Public Law 90-23, 81 Stat 54. Legislative history is found in House Report No. 1497 reporting on Senate Reports No. 813 and S-1160, found in U.S. Cong & Ad News, 1966, beginning at page 2418. The report is too lengthy to retype here but it is part of the record in the Appeals Court below.

The clearly express purpose of Congress in its Amendments to the A.P.A. was to correct the portions that were previously used as the governments major shield of secrecy concerning the peoples right to know.

Codified at 5 U.S.C. § 552 "(a) Each agency shall make available to the public information as follows:" *** "(B) statements of the general course and method by which its functions are channeled and determined,

including the nature and requirements of all formal and informal procedures available; *** "(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published..."

The petitioners premised there Motion to Dismiss upon the Secretary of the Treasury's failure to promulgate the method by which he channeled his functions to the C.I.R. pursuant to (B) above. The petitioners view (E) above as a public protection clause which also invites a person to participate in the enforcement of the Act by bringing the argument into the Courts for review and enforcement.

The petitioners also relied upon the notice requirements of 5 U.S.C. § 553 prior to final publication in the Federal Register. "A regulation is invalid if agency fails to follow procedures required by the Administrative procedures Act," see Buschmann v. Schweiker, 676 F.2d 352.

Respondent failed to file a brief in opposition nor did they make a meaningful oral argument at the hearing in the Tax Court below, other than attempting to claim executive autonomy from the Act.

The Tax Court issued an opinion on the petitioners Motion to Dismiss (95 T.C. No. 44, Appendix B) and an order and decision in favor of respondent.

The opinion begins with justifying the agencies noncompliance position with statute mandates, the opinion then rationalizes that the provisions of the statutes were complied

with. Cited was a duly promulgated Treasury Department Order (TDO) No. 120 represented as the published notice vesting respondent with authority to determine deficiencies and issue same to petitioners. In reality, the cite was a direct response to the question posed by petitioners in their Motion to Dismiss, and is found in 95 T.C. 44, footnote 20, (retyped in Appendix B).

Since the petitioners cannot possibly be the legitimate subjects of the authority granted to respondent by TDO No. 120, the application of said authority against the petitioners is error. From the time respondent assumed TDO No. 120 as their vested authority in this case, all further actions against petitioners became void as a matter of correctness.

Department of the Treasury Directors Manual, TD 80.01B of March 15, 1983, in

relative part (retyped in Appendix E) expressly shows that Department of the Treasury Order Number Code 120 is assigned to the Bureau of Alcohol Tobacco & Firearms.

The record will show briefs, motions and supplemental briefs filed by the parties during the course of this action within the Appeals Court.

Within a Motion to the Court served January 3, 1992, the petitioner/appellants included Declarations under the provisions of 28 U.S.C. 1746 showing they are not engaged in taxable activities for revenue purposes relative to Alcohol, Tobacco Products and Firearms.

On March 4, 1992, the Appeals Court issued a Memorandum Opinion (retyped in Appendix B) affirming the Tax Court findings and sanctioned petitioner/ appellants for bringing a frivolous appeal.

On March 16, 1992, petitioner/appellants served a Petition for Rehearing.

On May 14, 1992, the Appeals Court denied the appellants' petition for rehearing, (Retyped in Appendix C).

After the above denial of rehearing, Petitioner/appellant, Frank W. Stamos, through the Freedom of Information Act, has obtained new evidence relevant to TDO No. 120; certified copies of the original TDO, and every amendment in its history, show that from August 27, 1955, to February 10, 1992, the TDO vested delegated authority only to the Superintendent of the United States Mint, San Francisco, California.

This new evidence, in relevant part (Retyped in Appendix G) is inconsistent with Treasury Directive TD 80-01B of 3-15-83 (Retyped in Appendix E) showing application only to Alcohol, Tobacco and Firearms, and

the statement written by Gary R. Allen, Attorney for respondent/appellee in a letter to the Appeals Court (Retyped in Appendix H), "Treasury Department Order No. 120 applies to all Treasury Department functions." An absolute untruth!

This new evidence, plus the appellants' false statement, plus the Appeals Courts' tacit approach to TDO No. 120 in its Memorandum Decision of March 4, 1992, (retyped in Appendix B), led petitioner/ appellants to file a Motion in the Appeals Court, believing that any Judgment may be set aside for fraud discovered after the entry of judgment, see Wilkin v. Sunbeam Corp., 466 F2d 714, Cert denied 409 U.S. 1126, 93 S.Ct. 940, and that concerning fraud after judgment had expired, this Court decided, "The question, then, is not whether relief can be granted, but which

court can grant it", see Hazel-Atlas Glass Co. v. Hartford-Empire Co. 322 U.S. 238, 248 S.Ct. 997.

Many, many cites of case opinion could be inserted here dealing with the subject of fraud.

The Appeals Court received the Motion charging fraud styled as "Appellants' Motion and Brief to Dismiss for Lack of Jurisdiction" with "Affidavits of Frank W. Stamos and Lorna D. Stamos," on July 20, 1992, (Retyped in Appendix I - without 64 pages of exhibits).

The Appeals Court returned all motions with a cover letter (Retyped in Appendix J), "I am returning your motion to dismiss for lack of jurisdiction, because your case was closed on March 4, 1992 and your motion is moot."

The petitioners ask this Court to review

the record and remand this issue back to the Appeals Court below to consider the Motion to Dismiss and the Motion charging fraud. Or, dismiss the action taken by C.I.R. here by reversing the Appeals Court below.

CONCLUSION

The Tax Court erred in dismissing the petitions without opinion and abused its discretion, claiming autonomy from important Act of Congress, and then accepting a misapplied Treasury Department Order as being relevant to the Petitioners.

The Appeals Court abused its discretion by affirming the Tax Courts' omissions and errors of discretion.

This case is in concern for the law, and how the law will be secured by this Supreme Court, now and for America's posterity.

If indeed the Stamoses are indebted to the government for taxes and penalties, then let the federal agency involved use properly directed statutes and also properly directed delegated authority from department heads within the scope of correct administrative procedures. Arbitrary methods by federal agencies, such as employed in the action below, should not be allowed to stand when challenged in our Courts of Justice.

The petitioners move this Court to grant this petition.

Respectfully submitted this 10th. day of August, 1992.

Frank W. Stamos
In His Own Person
1115 S. Church Street
Lodi, California 95240

Lorna D. Stamos
In Her Own Person
1115 S. Church Street
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A P P E N D I X

FILED

MAR 4 - 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK W. STAMOS; LORNA D. STAMOS, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent-Appellee.	No. 91-70121 Tax Ct. No. 5621-89 MEMORANDUM*

Appeal from the United States Tax Court

Submitted February 26, 1992**

Before: CANBY, NORRIS, AND LEAVY, Circuit Judges.

Frank and Lorna Stamos appeal pro se the tax court's order upholding the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny the petitioners' request for oral argument.

Commissioner of Internal Revenue's ("CIR") determination of deficiencies and additions to tax for years 1981 through 1984. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The Stamoses failed to file federal income tax returns for tax years 1981 through 1984. The Internal Revenue Service ("IRS") issued the Stamoses notices of deficiency and additions to tax for those years. The Stamoses filed petitions in the tax court for a redetermination of the deficiencies and additions to tax for the years in question. The tax court upheld the CIR's determination of deficiencies and additions to tax. The Stamoses filed a petition for rehearing which the tax court denied. The Stamoses timely appealed the tax court's decision upholding the CIR's determination of deficiencies and additions to tax.

The Stamoses assert that the IRS's notices of deficiency were invalid because the IRS district director lacked the proper delegated authority to issue them. The Stamoses contend that under the Administrative Procedures Act, 5 U.S.C. § 551 et seq., all delegations of authority must be published in the Federal Register to be valid. Thus, the Stamoses contend, the government's failure to publish in the Federal Register those Treasury Delegation Orders ("TDO's"), which delegate the Secretary's power to administer the tax laws to the CIR or his delegates, deprives the IRS and its officers of the authority to issue notices of deficiency. This contention is meritless.

The Federal Register Act, 44 U.S.C. §§ 1501-1511, does not mandate the publication of TDO's, and consequently, we have held

that the government's failure to publish them does not affect the validity of the Secretary's delegation of authority to the CIR. See United States v. Saunders, 951 F.2d 1065, 1067-68 (9th Cir. 1991) (citations omitted).

Next, the Stamoses contend that the notices of deficiency issued to them are invalid because they represent an assessment of an unpaid estimated tax. The Stamoses point to section 6201(b)(1) of the Internal Revenue Code ("Code") which provides in relevant part that "[n]o amount of unpaid estimated tax under section 6153 or 6154 shall be assessed." See 26 U.S.C. 6201(b). This contention is also meritless.

The notices of deficiency are not based on unpaid estimated taxes, and thus, the Stamoses reliance on section 6201(b)(1) is misplaced. Instead, the CIR computed the

Stamoses tax deficiencies using substitute returns pursuant to the statutory authority granted in section 6020(b) of the Code. Section 6020(b) provides: "If any person fails to make any return required by any internal revenue law or regulation,... the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise." 26 U.S.C. 6020(b); See Road v. CIR, 847 F.2d 1379, 1882 n.1 (9th Cir. 1988). Such returns are "prima facie good and sufficient for all legal purposes." See 26 U.S.C. § 6020(b).[1/]

1/ On January 6, 1992, the Stamoses filed a "Motion to Overturn Agency Orders and Declare Appellees Actions Void for Want of Jurisdiction."

In their motion, the Stamoses argue that the tax court lacked jurisdiction to enter its decision because the statutory authority relied upon by the IRS, including sections 6651, 6653, 6203, and 6020(b), relate only to a tax liability involving alcohol, tobacco, or firearms. The Stamoses assert

We do not consider the issue of whether the tax court properly imposed sanctions on the Stamoses under section 6673 of the Code for bringing an action primarily for delay because the Stamoses do not raise the issue on appeal. See Wilcox v. CIR, 848 F.2d 1007, 1008 n.2 (9th Cir. 1988).

We have discretion to impose sanctions against litigants, even pro se, for bringing frivolous appeals. See Fed. R. App. P. 38; 28 U.S.C. 1912; Wilcox v. CIR, 848 F.2d 1007, 1008-09 (9th Cir. 1988). "An appeal

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6651, 6653, 6203, and 6020(b), relate only to a tax liability involving alcohol, tobacco, or firearms, the Stamoses assert that because they have not been involved in any taxable activity related to the sale of alcohol, tobacco, or firearms, the order and decision of the tax court is invalid. None of the statutory provisions cited by the Stamoses are limited to activity connected with the sale of alcohol, tobacco, or firearms. Moreover, we note that in a prior appeal to this court the Stamoses raised a variation of this argument which we found frivolous. See Stamos v. United States, 900 F.2d 263 (9th Cir. 1990). The motion is denied.

is frivolous when the result is obvious or the arguments of error are wholly without merit." Swimmer v. IRS, 811 F.2d 1343, 1345 (9th Cir. 1987). The Stamoses' arguments of error are wholly without merit. Accordingly we impose sanctions against the Stamoses in the amount of $1500.00.

AFFIRMED.

95 T.C. No. 44

UNITED STATES TAX COURT

FRANK W. STAMOS, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

LORNA D. STAMOS, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 5621-69, Filed December 12, 1990
5622-89

Before trial Ps moved to dismiss on the ground that the statutory notices of deficiency sent to them were invalid, because neither respondent, nor the District Director had authority to issue them under Treasury Department Order 150-10, secs. 301.7805-1, 301.7701-9, and 301.6212-1, Proced. & Admin. Regs. Held, Treasury Department Orders need not be published in accordance with the Federal Register Act or the Administrative Procedure Act to be effective. Held further, sec. 301.7805-1, Proced. & Admin. Regs., is excepted out of the requirements of the Administrative Procedure Act. Held further, secs. 301.7701-9 and 301.6212-1, Proced. & Admin. Regs., were proposed and promulgated in accordance with the Administrative Procedure Act.

Frank W. Stamos and Lorna D. Stamos, pro se.

Bridgette M. Gibson, for the respondent.

PARR, Judge: Respondent determined deficiencies in and additions to petitioners' Federal income tax as follows:

Frank W. Starros
docket No. 5621-89

Year	Deficiency	Additions to Tax under sections 6651(a)(1)	6653(a)(1)	6653(a)(2)	6654	6661
1981	$27,259	$6,815	$1,363	*	$2,088	-
1982	15,471	3,868	774	*	1,506	$3,868
1983	8,496	2,124	425	*	520	2,124
1984	8,324	2,081	416	*	523	2,081

* 50 percent of the interest payable on the portion of the underpayment attributable to negligence or intentional disregard of rules or regulations.

Lorna D. Starros
docket No. 5622-89

Year	Deficiency	Additions to Tax under sections 6651(a)(1)	6653(a)(2)	6653(a)(2)	6654	6661
1981	$24,497	$6,124	$1,225	*	$1,877	
1982	12,442	3,111	622	*	1,211	$3,110
1983	5,158	1,290	258	*	315	1,289
1984	4,053	1,013	203	*	255	

* 50 percent of the interest payable on the portion of the underpayment attributable to negligence or intentional disregard of rules or regulations.

Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended and in effect for the taxable

years an issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

These cases were consolidated for trial, briefing, and opinion. Shortly before the scheduled trial date, petitioners filed a motion to dismiss pursuant to Rule 53 alleging that the statutory notices of deficiency were invalid, because they were issued by a person who lacked delegated authority. At the hearing on petitioners' motions and trial of these cases respondent filed a cross-motion to dismiss for failure to properly prosecute and a motion for damages under sections 6673. The motions were taken under advisement and trial of consolidated cases proceeded.

The issues presented for decision are:

(1) In regard to petitioners' motion to

dismiss whether the notices of deficiency issued to the petitioners herein are invalid; if not,

(2) in regard to respondent's motions, whether petitioners failed to properly prosecute their case and whether respondent is entitled to an award for damages pursuant to section 6673; and,

(3) whether petitioners are liable for the deficiencies and additions to tax as determined by respondent.

Petitioners resided in Lodi, California, at the time they filed their petitions. Petitioner Lorna Stamos appeared at trial but did not offer evidence. She indicated she agreed with her husband.

Unless otherwise indicated, all references to petitioner refer to Frank W. Stamos.

For taxable years ending December 31,

1979, and December 31, 1980, petitioners filed joint Federal income tax returns. However, they failed to file returns for taxable years 1981 through 1984. Pursuant to section 6020(b) respondent prepared separate substitute returns for petitioners. On December 29, 1988, respondent sent petitioners the notices of deficiency here in issue. All notices were signed on behalf of respondent by the District Director, Sacramento, California, Office of the Internal Revenue Service (IRS).

Petitioners timely invoked the jurisdiction of the Court by filing their respective petitions seeking redetermination of the deficiencies.

During informal pretrial discovery, petitioners failed to provide documentation to support their income amount or entitlement to any credits or deductions,

even though respondent made several attempts to ascertain the information. Instead, petitioner made "informal discovery requests" to respondent asking a battery of standard tax protestor questions, including: "Do the respondents [sic] records indicate that the petitioner is a citizen " or "a resident of the United States," "Do the respondents contend that the State of California is included in the term 'United States' as used in section 6012-1(a)(1)(i) & (ii), [sic]" and "Do the respondents contend that the petitioner is an individual required to make returns of income pursuant to 26 U.S.C. 6012 and 26 C.F.R. 1.6012-1." On January 16, 1990, petitioner filed a motion to compel response to those requests, which was denied.

Additionally, petitioner requested information under the Freedom of Information

Act and information on the authority of revenue officers to determine deficiencies. Respondent's agents provided some of the information requested, and advised petitioner to seek other information through respondent's counsel, since the petitions for redetermination had been filed in this Court.

Three weeks before trial respondent's counsel sent petitioners a proposed stipulation of facts. One week before trial petitioner met with respondent's counsel. However, petitioner again failed to produce any documents, and failed to sign the stipulation of facts.

After the hearing on the motions, the Court asked petitioners whether they wanted to discuss the substantive issues raised in the notices of deficiency. Petitioner replied

> No. * * * I believe that there is no notice of deficiency before the Court. Because the Secretary of the Treasury did not determine them, as the code section requires, and the Secretary of the Treasury himself did not sign or send them.
>
> THE COURT: All right. Well, I just want you to know this is the only chance you're going to have to raise this issue. If I should * * * rule in favor of the government, and you have not put on any substantive evidence about the matters raised in the notice of deficiency, you will lose for failing to carry your burden of proof. Do you understand that?

Thereafter, petitioners offered evidence only on the addition under section 6654.

Petitioners' Motions

Petitioners' motions to dismiss are predicated upon allegations that the notices of deficiency are invalid, because they were issued by a person not duly authorized to do do. Petitioners, relying on the language contained in Commissioner's Delegation Order

(DO) No. 77 (Rev.24),[1] allege that either respondent, nor the District Director had authority to send the notices of deficiency here in issue for the following reasons:

(1) Treasury Department Order No. 150-10,[2] was not published in the Federal Register in accordance with section 5 of the Federal

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[1] Delegation Order (D)) No. 77 (Rev. 24), 54 Fed. Reg. 10612 (Mar. 14, 1989), effective March 9, 1989, states in relevant part the following:

> 1. The authority grated to the Commissioner of Internal Revenue and District Directors, by 26 CFR 301.7701-9, 26 U.S.C. 6212, 26 CFR 301.6212-1, Treasury Order 150-10, and 26 CFR 301.6861-1 to sign and send to the taxpayer by registered or certified mail any notice of deficiency is hereby delegated to the officials listed below. ***
> 4. Delegation Order No. 77 (Rev. 23 effective June 16, 1988 is superseded.

[2] Petitioners rely on Treasury Department Order No. 150-10, effective October 1, 1986, filed with the Federal Register on July 10, 1986. Treasury Department Order No. 150-10 provides a complete list of Internal Revenue Districts. See Standard Federal Tax Reporter (CCH) July 23, 2986, p. 71,722 par. 6585.

Register Act[3] (FRA) and section 3 of the Administrative Procedure Act[4] (APA). Therefore, the Secretary of the Treasury (Secretary) did not properly delegate to respondent authority to send statutory notices of deficiency.

(2) Even if respondent had authority to send notices of deficiency, he lacked delegated authority to propose regulations, with the approval of the Secretary, under sections 6212 and 7701 delegating that authority to the District Director. That is, section 301-7805-1, Proced. & Admin. Regs.,[5] is invalid because it was not

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[3] Act of July 26, 1935, ch. 417 sec. 5, 49 Stat 501, and currently codified at 44 U.S.C. sec. 1505(a) (1988). See Act of October 22, 1968, Pub. L. 90-620, 82 Stat. 1274.

[4] Act of June 11, 1946, ch. 324 sec. 3, 60 Stat 238 and currently codified at 5 U.S.C. sec 552(a)(1) (1988). See Act of September 6, 1966, Pub. L. 89-544, 80 Stat. 383.

properly proposed as a rule or a regulation in accordance with section 4(a) and (c) of the APA,[6] or published as required by section 5 of the FRA.

(3) Even if section 301.7805-1, Proced. & Admin. Regs., is valid, paragraph 22 of Treasury Decision 6118, 1955-1 C.B. 698, was not properly proposed as a rule or regulation in accordance with section 4(a) of the APA[7] and section 301.7701-9, Proced. & Admin. Regs., did not supersede paragraph 22. Additionally, section 301.6212-1, Proced. & Admin. Regs., was promulgated

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[5] Sec. 301.7805-1, Proced. & Admin. Regs., was added by Treasury Decision 6498, effective October 24, 1960, and published in 25 Fed. Reg. 10154 (Oct. 25, 1960).

[6] Act of June 11, 1946, ch 324 sec. 4, 60 Stat 238 and currently codified at 5 U.S.C. sec. 553 (1988). See Act of September 6, 1966, Pub. L. 89-554, 80 Stat. 383.

[7] See 5 U.S.C. sec. 553(b) (1988).

without justification as required by section 4(c) of the APA.[8]

We find these arguments unpersuasive.

Treasury Department Orders

We must decide whether the failure to publish Treasury Department Order No. 150-10 renders the delegation of authority to respondent invalid. Petitioners allege that (1) all orders affecting the rights and obligations of the United States citizens must be published in accordance with the FRA (see 44 U.S.C. 1505(a)(1)) (1988); (2) section 552 of 5 U.S.C. is an Act of Congress that requires Treasury Department Orders to be published (see 44 U.S.C. sec. 1505(a)(3) (1988)); and (3) no citizen can be adversely affected or bound by an unpublished order, and "may safely ignore such order with impunity" (see 5 U.S.C. sec. 552(a)(1) (1988) and 44 U.S.C. sec.

1507 (1988)). Petitioners conclude that the plain terms of section 552, and its predecessor, require that Treasury Department Orders be published in the Federal Register. We do not agree.

The authority to determine and issue statutory notices of deficiency is vested by statute in the Secretary. See sec. 6212(a). The term "Secretary" is defined in section 7701(a)(11)(B) as "the Secretary of the Treasury or his delegate." The phrase "or his delegate" is defined in section 7701(a)(12)(A)(i) as "any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the

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[8] See 5 U.S.C. sec. 553(d) (1988).

context."

The method which the Secretary uses most often to delegate authority to department heads, including the commissioner, is the issuance of a Treasury Department Order. See Hatcher v. United States, 733 F. Supp. 218(M.D. Pa. 1990); Treasury Department Order No. 150-36;[9] Treasury Department Order No. 150-37.[10] After the Secretary delegates authority to the Commissioner, the Commissioner may redelegated that authority to his subordinates. See DO No. 77 (Rev 24).

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[9] Treasury Department Order No. 150-36, 19 Fed. Reg. 5411 (Aug. 25, 1954).

[10] On March 17, 1955, the Secretary issued Treasury Department Order No. 150-37, which formalized the duties of the Chief Counsel. The did not make any changes in the internal organization of the Treasury Department of the IRS. See Standard Federal Tax Reporter (CCH) April 20, 1955, p. 68,191 par. 48,263 Supp. Vol.; G.C.M. 33972 (Nov. 21, 1968)

Section 5 of the FRA[11] (44 U.S.C. sec. 1505(a) (1988)) requires (1) proclamations and executive orders; (2) documents having general applicability and legal effect; and (3) documents required to be published by Act of Congress, i.e., 5 U.S.C. sec. 552(a) (1988), to be published in the Federal Register. However, a person having actual knowledge of the contents of the document may not assert the failure to publish the matter as a defense. See 44 U.S.C. 1507 (1988).

As originally enacted, sec. 3(a) of APA[12]

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[11] For ease of discussion, subsequent references to the FRA shall be to corresponding section numbers in 44 U.S.C. sec. 1501 et seq. (1988), rather than to the section number in the original act.

[12] See 5 U.S.C. sec. 552(a) (1988). For ease of discussion, subsequent references to "APA sections" shall be to corresponding section numbers in 5 U.S.C. sec. 551 et seq. (1988), rather than to the section number in the original act.

required every agency to publish in the Federal Register "(1) descriptions of its central and field organization including delegations by the agency of final authority." On June 5, 1967, 5 U.S.C. sec. 522(a) (1988), was amended[13] and the language "including delegations by the agency of final authority" was deleted from its provision. Currently section 552(a) requires publication only of those matters which, if not published, would adversely affect a member of the public. New York v. Lyng, 829 F.2d 346, 354 (2d Cir. 1987); United States v. Fitch Oil Co., 676 F.2d 673, 678 (Temp. Emer. Ct. App. 1982); United States v. Goldman, 605 F.2d 274, 280 (6th Cir 1970), cert. denied 401 U.S. 910 (1971).

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[13] Amending law is Act of July 4, 1976, Pub. L. 90-23, sec. 1, 81 Stat 54.

However, the publication requirement is inapplicable to a person who has actual and timely notice of the content of the document required to be published, but not so published. United States v. Mowat, 582 F.2d 1194, 1201 (9th Cir. 1978), cert. denied 439 U.S. 967 (1978); 5 U.S.C. sec. 552(a)(1) (1988).

For the following reasons, we find that Treasury Department Order No. 150-10 need not be published in the Federal Register to be effective, and therefore, the Secretary duly delegated to respondent authority to send statutory notices of deficiency.

First, delegation orders do not affect the rights and obligations of citizens. They are not substantive or legislative-type rules of law, but rather rules of internal agency/management procedure. United States v. McCall, 727 F. Supp. 1252, 1254 (N.D.

Ind. 1990). See D & W Food Centers, Inc. v. Block, 786 F.2d 751 (6th Cir. 1986); United States v. Hayes, 325 F.2d 307 (4th Cir. 1963).

Second, section 552 of 5 U.S.C. does not require all internal delegations of authority be published in order to be effective. Under its provisions, "the requirement for publication applies only to matters which, if not published, would adversely affect a member of the public." United States v. Fitch Oil Co., 676 F.2d at 678, citing Hogg v. United States, supra; United States v. Goodman, 605 F.2d at 887-888; United States v. McCall, 727 F. Supp. at 1254. Petitioners have failed to prove how a member of the public would be adversely affected if Treasury Department Order 150-10 was not published.

Moreover, the Treasury Department Order

No. 150-10 petitioners rely on does not delegate "new" authority to respondent. It merely sets for the complete list of Internal Revenue Districts, as previously set forth in Treasury Department Order No. 150-01,[14] with one major change: it created two Internal Revenue Districts within the State of Florida, rather than one statewide district. That being the only change, we do not see how a member of the public could be adversely affected by its nonpublication. Accordingly, the failure to publish Treasury Department Order 150-10 in the Federal Register does not make it ineffective. United States v. McCall, supra. See United States v. Hayes, 325 F.2d 307 (4th Cir. 1963): Van Sant v. United States, 90-1

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[14] Filed by the Office of the Federal Register on March 18, 1986, and published in 51 Fed. Reg. 9571 (Mar. 19, 1986).

U.S.T.C. par. 50,284, __ A.F.T.R. 2d __-___ (D. Colo. 1990).

Third, even assuming that Treasury Department Order No. 150-10 should have been published in the Federal Register and was not, petitioners have not advanced any argument explaining how they were adversely affected by the failure to publish it. United States v. McCall, 727 F. Supp. at 1254. See United States v. Goodman, 605 F.2d at 887-888; Hogg v. United States, 428 F.2d at 280, cited with approval in New York v. Lyng, 829 F.2d at 354.

Moreover, petitioners even admit that respondent had authority to determine deficiencies and to send notices under the 1939 Code and before the Reorganization Plan No. 26 of 1950[15] (Plan26). See sec. 272(a) of the Internal Revenue Code of 1939. However, relying on Treasury Department

Order Nos. 150-37,[16] 150-42,[17] 150-01,[19] they incorrectly conclude that the Secretary delegated little Federal income

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[15] The Reorganization Plan No. 26 of 1950 (Plan 26), 64 Stat. 1280. See 15 Fed. Reg. 4935 (Aug. 2, 1950).

Plan 26 provides in relevant part as follows:

SECTION 1. Transfer of functions to the Secretary. (a) Except as otherwise provided in subsection (b) of this section, * * * there are hereby transferred to the Secretary of the Treasury all functions of all other officers of the Department of the Treasury and all functions of all agencies and employees of such Department.

* * *

SEC. 2. Performance of functions of Secretary. The Secretary of the Treasury may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Treasury of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

[16] Treasury Department Order No. 150-37, supra n. 10, provides in relevant part the following:

By virtue of the authority vested in me as Secretary of the Treasury, including the authority in the

tax enforcement authority to the Commissioner after Plan 26.

Internal Revenue Code of 1954 and Reorganization Plan No.26 of 1950, it is ordered as follows:

1. The Commissioner of Internal Revenue shall be responsible for the administration and enforcement of the Internal Revenue Laws.

2. An Assistant General Counsel of the Department of the Treasury shall serve as Chief Counsel of the Internal Revenue Service and as counsel and legal advisor to the Commissioner in all matters pertaining to the administration and enforcement of the Internal Revenue laws. The Chief Counsel shall serve as a member of the Commissioner's executive staff.

* * *

5. All outstanding orders and delegations of authority relating to the above subjects are modified accordingly.

[17] Treasury Department Order No. 150-42, effective July 27, 1956, was published in 21 Fed. Reg. 5852 (Aug. 4, 1956).

[18] Petitioners focus on the following portion of Treasury Department Order No. 150-01, 51 Fed. Reg. 9571 (Mar. 19, 1986):

6. U.S. Territories and Insular Possessions. The Commissioner shall, to the extent of authority otherwise vested in him, provide for the administration of the United States internal revenue laws in the U.S. territories and insular possessions and other authorized areas of the world.

As evidenced by Treasury Department Order No. 120[20] and Treasury Department Order 150-2[21], the Secretary delegated general enforcement authority to the Commissioner,

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[19] Petitioners rely on the following portion of Treasury Department Order No. 150-10:

5. U.S. Territories and Insular Possessions. The Commissioner shall, to the extent of authority otherwise vested in him, provide for the administration of the United States internal revenue laws in the U.S. territories and insular possessions and other authorized areas of the world.

[20] On July 31, 1950, the day Plan 26 became effective, the Secretary directed that "officers of the Treasury Department" * * * "continue to perform the functions they were authorized to perform immediately prior to the effective date of the Reorganization Plan." Thus, this delegation included the authority to determine deficiencies and send notices.

[21] In May 1952 the Secretary delegated authority to respondent to perform all functions of all "officers, employees, and agencies" of the IRS which had not already been transferred to him as of May 15, 1952, except the functions of the Assistant General Counsel. Treasury Department Order No. 150-2 became effective May 15, 1952, and published in 17 Fed. Reg. 4590 (May 20, 1952).

including the authority to send notices of deficiency. Moreover, the Commissioner's authority continued after the enactment of the Internal Revenue Code of 1954 (1954 Code). See Dudley v. Commissioner, 258 F.2d 182 (3d Cir. 1958), affg. 28 T.C. 992 (1957); sec. 7851(b)(3); Treasury Department Order150-36.[22]

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[22] On August 17, 1954, the Secretary issued Treasury Department Order No. 150-36. Treasury Department Order No. 150-36 made Treasury Department Order No. 150-2 effective under the Internal Revenue Code of 1954. See 1954-2 C.B. 733. Treasury Department Order No. 150-36, 19 Fed. Reg. 5411 (Aug. 25, 1954), provides as follows:

1. By virtue of the authority vested in me by Reorganization Plan No. 26 of 1950 and Section 7804(a) of the Internal Revenue Code of 1954, each delegation of authority, and each redelegation of authority made pursuant to such delegation, which:

(1) Was in effect immediately preceding the enactment of the Internal Revenue Code of 1954, and

(2) Was continued in effect upon the enactment of the Internal Revenue Code of 1954 pursuant to the provisions of section 7851(b)(3) of such Code, is hereby amended to include any additional or revised

Last, in light of the clear recognition in case law, previous published Treasury Department Orders, and the Federal Regulations, affirming the Commissioner's authority to enforce the Internal Revenue Code, we find the failure to publish Treasury Department Order No. 150-10 harmless. Kellogg v. Commissioner, 88 T.C. 167 (1987); Estate of Brimm v. Commissioner,

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functions created or authorized by the Internal Revenue Code of 1954 which are essential to the performance of, or are directly related to, any function included in such delegation or redelegation of authority. Each delegation or redelegation of authority so amended shall be subject to amendment, modification, or revocation to the same extent, and in the same manner, as authorized immediately preceding this amendment by this Order.

2. The preceding paragraph shall not be construed as delegating to any officer or employee of the Internal Revenue Service any function existing under the Internal Revenue Code of 1954 which corresponds to any function which existed under the Internal Revenue Code of 1939 and which immediately preceding the enactment of the Internal Revenue Code of 1954 had not been delegated by the Secretary.

70 T.C. 15 (1978); Perlmutter v Commissioner 44 T.C. 382 (1965), affd. 373 F.2d 45 (10th Cir. 1067); sec. 301.7805-1(a) and (c), Proced. & Admin. Regs. See Reimer v. United States, 90-1 U.S.T.C. par. 50,285, __ A.F.T.R. 2d __-___ (D. Hawaii 1990).

Authority of Commissioner to propose regulations

We must now decide whether respondent, with the approval of the Secretary, had authority to propose regulations delegating to the District Director authority to send statutory notices of deficiency. If so, whether those regulations were properly proposed in accordance with the APA.

Petitioners contend that section 301.7805-1, Proced. & Admin. Regs., was not properly proposed as a rule or regulation in accordance with sections 552 and 553 of the APA, and therefore, respondent lacked

authority to propose sections 301.7701-9 and 301.6212-1, Proced. & Admin. Regs.

These contentions are without merit.

1. Sec. 301.7805-1, Proced. & Admin. Regs.

Under section 553 of the APA, only "substantive" rules must meet the notice, comment, and publication requirements before final implementation. Guadamuz v. Bowen 859 F.2d 762, 771 (9th Cir. 1988); "Interpretative" rules, general statements of policy, or rules of agency organization, procedure, or practice" are excepted from this provision. 5 U.S.C. sec. 553(b)(A) (1988). See Zaharakis v. Heckler, 744 F.2d 711 (9th Cir. 1984); Wing v. Commissioner, 81 T.C. 17, 27 (1983); United States v. Mowat, 582 F.2d at 1199.

Substantive rules are ones "affecting individual rights and obligations," Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979),

"effect a change in existing law or policy," Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983), and which are "issued by an agency pursuant to statutory authority and ... implement the statute." Chrysler Corp. v. Brown, supra; Zaharakis v. Heckler, 744 F.2d 711, 713 (9th Cir. 1984), citing Batterton v. Marshall, 648 F.2d 694, 701-702 (D.C. Cir. 1980).

Section 301.7805-1, Proced. & Admin. Regs., added by T.D. 6489 and published in the Federal Register, 25 Fed. Reg. 10154 (Oct. 25, 1960), provides in relevant part, the following:

> (a) Issuance. The Commissioner, with the approval of the Secretary, shall prescribe all needful rules and regulations for the enforcement of the Code (except where this authority is expressly given by the Code to any person other than an officer or employee of the Treasury Department), including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

It is not a substantive rule, but rather a

rule of agency organization, procedure, or practice. Accordingly, it falls within the exception under section 553)b)(A), APA.

Moreover, because section 301.7805-1(a), Proced. & Admin. Regs., was published in the Federal Register, sectin 552(a)(1)(D) of the APA is satisfied. Thus, we need not decide whether it has general applicability[23] and whether its nonpblication would adversely affect the public.

Based on the foregoing, we conclude that section 301.7805-1, Proced. & Admin. Regs., was properly proposed in accordance with the APA and is, therefore, valid. Accordingly, respondent, with the approval of the

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23 If a regulation only clarifies or explains existing laws or regulations and has no significant impact upon any segment of the public, then it does not have "general applicability." United States v. Mowat, 582 F.2d 1194, 1200 (9th Cir. 1978); Anderson v. Butz, 550 F.2d 459, 463 (9th Cir. 1977).

Secretary, had delegated authority to propose sections 301.7701-9 and 301.6212-1, Proced. & Admin. Regs.

2. Sec. 301.7701-9, Proced. & Admin. Regs.

Petitioner contends that paragraph 22[24] of T.D. 6118, 1955-1 C.B. 718-719, was not proposed as a rule as required by section 553 of the APA, and that T.D. 6503, 1960-2 C.B. 409, did not supersede paragraph 22. Thus, section 301.7701-9, Proced. & Admin. Regs., is invalid. We do not agree.

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[24] Paragraph 22 of T.D. 6118 in relevant part provides as follows:

In any case in which a function is vested by the Internal Revenue Code of 1954 in the Secretary or his delegate, and Treasury regulations or Treasury decisions (including this Treasury decision) provide that such function may be performed by a District Director of Internal Revenue, * * * or employee in the office of a District Director * * *

(a) Such provision in the regulations or a Treasury Decision shall constitute a delegation by the Secretary to the Commissioner of the authority to perform such function and a redelegation thereof by

Without deciding whether paragraph 22 was properly proposed as required by the APA, we nevertheless find that section 301-7701-9, proced. & Admin. Regs., was proposed in accordance with the APA.

On December 23, 1959, a notice of proposed rule making was published in the Federal Register[25] regarding regulations under section 7701 in accordance with section 552(b) of the APA. Included therein was

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the Commissioner to the designated officer or employee, and

(b) An officer or employee authorized by regulations or a Treasury Decision to perform a function shall have authority to redelegate the performance of such function to any officer or employee performing services under his supervision and control, unless such power to so redelegate is prohibited or restricted by proper order or directive, and

(c) The Commissioner may also redelegate authority to perform such function to other officers or employees of the Internal Revenue Service and, to the extent he deems proper, may authorize further redelegation of such authority, * * * 1955-1 C.B. at 718-719.

[25] 24Fed. Reg. 10450, 10455 (Dec. 23, 1959).

section 301.7701-9(b), (c), and (d), proced. & Admin. Regs., which did supersede para 22 of T.D. 6118. 1955-1 C.B. 698, 718.

On February 25, 1960, a public hearing was held on these proposed regulations See 25 Fed. Reg. 726 (Jan 28, 1960). The proposed regulations, including 301.7701-9, Proced. & Admin. Regs., were adopted on November 14, 1960, after consideration was given to all relevant matter presented by interested persons at the public hearing. On November 17, 1960, section 301.7701-9, Proced. & Admin. Regs., was published in the Federal Register[26] in accordance with section 553(d) of the APA.

Accordingly, section 301.7701-9, Proced. & Admin. Regs. is valid.

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[26] 25 Fed. Reg. 10928, 10934 (1960); T.D. 6503, 1960-2 C.B. 409.

3. Sec. 301-6212-1, Proced. & Admin. Regs.

Petitioners contend section 301-6212-1, Proced. & Admin, Regs., is invalid because it was not published at least 30 days before it became effective. See 5 U.S.C. sec. 553(d) (1988). We do not agree.

After notice and public comment, final regulations were published in the Federal Register[27] on January 4, 1955. The Commissioner, with the approval of the Secretary, determined that because those regulations were necessary for the enforcement of the applicable provisions of the Internal Revenue Code of 1954, effective January 1, 1955, it was impracticable and contrary to the public interest to promulgate them subject to the effective

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[27] 20 Fed. Reg. 28 (1955); T.D. 6119, 1955-1 C.B. 145, 153.

date limitation of section 553(d) of the APA. Accordingly, they became effective on January 1, 1055. See T.D. 6119, 1955-1 C.B. at 195.

The legislative history of section 553(d) of the APA indicates that the primary purpose for deferring the effectiveness of a rule was to "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take other action which the issuance of rules may prompt," not to encourage republication dialogue. S. Rept. No. 752, 79th. Cong., 1st Sess. 15 (1946); H. Rept. No. 1980, 79th Cong., 2d Sess. 25 (1946). The legislative history also indicates that "the APA was not intended to unduly hamper agencies from making a rule effective immediately, or at some time earlier than 30 days." United States v. Gavrilovic, 551 F.2d 1099, 1104

(8th Cir 1977). However, the good cause exception "requires legitimate grounds supported in law and fact by the required finding." Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 752 (1987), citing United States v. Gavrilovic, supra. In our view, the Commissioner's approved determination was a accurate. Accordingly, we find that the "good cause" exception of section 552(d) of the APA applies to section 301.6212-1, Proced. & Admin. Regs.

However, even if we found the exception under section 553(d) inapplicable, the regulation would nevertheless be valid and applicable to petitioners, since it would have otherwise been effective on February 3, 1955. See Rowell v. Andrus, 631 F.2d 699, 704 (10th Cir. 1980); United States v. Gavrilovic, 551 F.2d at 1106.

Additionally, we note that it is doubtful

that treasury regulations need to comply with the 30-day notice requirement in order to be valid in light of the fact that section 7805(b) takes precedence over the general notice requirements of the APA. See Redhouse v. Commissioner, 728 F.2d 1249, 1253 (9th Cir. 1984), affg. Wendland v. Commissioner, 79 T.C. 355 (1982), cert. denied 469 U.S. 1034 (1984); Wing v. Commissioner, 81 T.C. at 30 n. 17.

Based on the foregoing, we conclude that respondent and the District Director had authority to issue the statutory notices of deficiency here in issue, i.e., respondent pursuant to Treasury Department Orders and the regulations, and the District Director pursuant to the regulations. See Kellogg v. Commissioner, 88 T.C. 172; Estate of Brimm v. Commissioner, 70 T.C. at 19-20. Thus, the statutory notices of deficiency issued

to petitioners are valid, and petitioners' motion to dismiss is denied.

Moreover, we conclude that petitioners failed to carry their burden of proof on the substantive issues, since they failed to present any competent evidence at trial. Accordingly, petitioners are liable for the deficiencies as determined by respondent. Respondent's motion, with regard to dismissal for failure to prosecute, is denied as moot.

We now consider whether to award damages to the United States under section 6673.

Whenever it appears to the Court that a taxpayer's position in a proceeding is frivolous or groundless, that the proceeding was instituted or maintained primarily for delay, or that the taxpayer unreasonably failed to pursue available administrative remedies, damages (now called a penalty) in

the amount not in excess of $25,000[28] shall be awarded to the United States by the Court in its decision.

Petitioners' failure to provide respondent with information requested and failure to offer evidence at trial pertaining to the substantive issues raised in the notice of deficiency convinces us that this suit was instituted primarily for delay. Accordingly, we award damages to the United States in the amount of $5,000 in docket No. 5621-89 and $5,000 in docket No. 5622-89.

To reflect the foregoing, Appropriate orders will be entered, and decisions will be entered for respondent.

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[28] The amount of the penalty was increased from $5,000 to $25,000 by the Revenue Reconciliation Act of 1989, Pub. L. 101-239, sec. 7731(a), 103 Stat. 2106, 2400 applicable to positions taken after December 31, 1989, in the proceedings which are pending or commenced after such date.

FILED

MAY 14 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK W. STAMOS; LORNA D. STAMOS,	)	
	)	No. 91-70121
Petitioners-Appellants,	)	
	)	Tax Ct. No.
v.	)	5621-89.
	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	ORDER
	)	
Respondent-Appellee	)	

Before: Canby, Norris, and Leavy, Circuit Judges.

The appellant's petition for rehearing and request for publication under Circuit Rule 36-4 is DENIED.

FILED

MAY 14 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK W. STAMOS; LORNA D. STAMOS, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent-Appellee	No. 91-70121 Tax Ct. No. 5622-89 ORDER

Before: Canby, Norris, and Leavy, Circuit Judges.

The appellant's petition for rehearing and request for publication under Circuit Rule 36-4 is DENIED.

FRANK W. & LORNA D. STAMOS
1115 S. Church Street
Lodi, California 95240
(209) 334-5724

June 22, 1992

CATHY A. CATTERSON
Clerk, U.S. Court of Appeals
for the Ninth Circuit
50 United Nations Plaza
San Francisco, CA 94101-4909

Re: Our letter of May 22, 1992 - Stamos v. C.I.R. 91-70121

Dear Ms Catterson:

Please find a copy of the above referenced letter attached, the letter was a request for documents contained in the record concerning the recently decided appeal before this Court.

We feel slighted by this Court; we were denied oral arguments, denied publication and now we are apparently being denied substantive excerpts of the record which are absolutely crucial to the decree of this Court.

Page 3 of the Courts' Memorandum filed March 4, 1992, clearly shows that the record contains substitute returns filed against appellants, by appellee, under the authority of 6020(b) of the Code. During the course of this action, we have never seen nor been served with such documents, we feel we should see and have a copy of same, especially since they were used as the premise to rule against us.

Also, the kernel challenge of the action centered around respondents delegated authority, or lack thereof, to determine a deficiency against petitioners. The United States Tax Court, in its published decision, showed such authority to be Treasury Department Order No. 120. We challenged, in this Court, said authority as being misdirected, but was never served, nor have we seen, a copy of the opposition to our

argument by respondent. It is curious that on February 10, 1992, Treasury Department Directive No. 00-07 canceled Treasury Department Order No. 120.

If there are no documents in the record responsive to our request, please clearly state that no documents exist. If you do not respond to this request within 10 days we will presume and assume that no documents exist responsive to our request within the record of 9th. Circuit Case No. 91-70121.

Sincerely,

/s/
Frank W. Stamos, Appellant

/s/
Frank W. Stamos, Appellant

Certified Mail, P 426 305 309

FRANK W. & LORNA D. STAMOS
1115 S. Church Street
Lodi, California 95240
(209) 334-5724

May 22, 1992

CATHY A. CATTERSON
Clerk, U.S. Court of Appeals
for the Ninth Circuit
Post Office Box 547
San Francisco, California 94101-0547

Re: Frank W. and Lorna D. Stamos v. C.I.R.
No. 91-70121

Dear Ms Catterson:

Apparently there was important evidence filed by appellee with this Court that was never served upon appellants.

That appellants may also know and understand the premise by which this Court arrived at its conclusions in this case, please copy and send to us the following documents from the record:

1. Copies of all returns, executed by appellee against appellants, under the authority of 26 USC § 6020(b).

2. Copies of all evidence, filed by appellee, showing appellants to be the legitimate subjects of appellee's authority pursuant to 26 USC 6020(b).

3. Copies of all evidence, filed by appellee, showing appellants to be the legitimate subjects of appellee's authority pursuant to Treasury Department Order Number 120.

We promise to pay copying costs and postage relative to this request.

Sincerely,

/s/
Frank W. Stamos

/s/
Lorna D. Stamos

Certified Mail No. P 882 703 865

TD 80-01B Attachment 2

3-15-83

DEPARTMENT OF THE TREASURY ORDER NUMBER CODES

100	Secretary of the Treasury Executive Secretariat Deputy Secretary Under Secretary for Monetary Affairs Inspector General
101	Heads of Bureaus
102	Assistant Secretary (Administration)
103	Assistant Secretary (Domestic Finance)
104	Assistant Secretary (Economic Policy)
105	Assistant Secretary (Enforcement and Operations)
106	Fiscal Assistant Secretary
107	The General Counsel
108	Assistant Secretary (International Affairs)
109	Assistant Secretary (Legislative Affairs)
110	Assistant Secretary (Public Affairs)

111	Assistant Secretary (Tax Policy)
112	Treasurer of the United States U.S. Savings Bond Division
113	Assistant Secretary (Public Liaison and Consumer Affairs)
114	Assistant Secretary (Electronic

BUREAUS

120	Bureau of Alcohol, Tobacco and Firearms
125	Comptroller of the Currency
130	Reserved
135	Bureau of Engraving and Printing
140	Federal Law Enforcement Training Center
145	Bureau of Government Financial Operations
150	Internal Revenue Service
155	Bureau of the Mint
160	Bureau of the Public Debt
165	U.S. Customs Service
170	U.S. Secret Service

UNITED STATES TAX COURT

WASHINGTON, D.C.

FRANK W. STAMOS	) Docket No.
	) 5621-89
Petitioner,	)
	)
v.	)
	)
COMMISSIONER OF INTERNAL REVENUE	)
	)
Respondent.	)
	)

PETITION FOR REDETERMINATION

Frank W. Stamos hereby petitions for redetermination, in abatement, of an alleged deficiency for estimated income tax including interest and additions to estimated tax stated therein, and as the basis for petitioner's cause, petitioner states and alleges as follows:

1. The petitioner in this case is Frank W. Stamos whom resides at 1115 S. Church St., Lodi, California 95240.

2. The attached notice of deficiency was

apparently issued by Raymond Spillman, District Director of the Sacramento office of the Internal Revenue Service, State of California, for the years in the above entitled case which follows:

Year	Date Issued	Amount Alleged
1981	Dec. 29, 1988	$ 27,259.00
1982	Dec. 29, 1988	15,471.00
1983	Dec. 29, 1988	8,496.00
1984	Dec. 29, 1988	8,324.00

Additions to Tax

Year	§6651(a)(1)	§6653(a)(1)	§6654(a)	§6661(a)
1981	$ 6,815.00	$ 1,363.00	$ 2,088.00	$ 0.00
1982	$ 3,868.00	$ 774.00	$ 1,506.00	$3,868.00
1983	$ 2,124.00	$ 425.00	$ 520.00	$2,124.00
1984	$ 2,081.00	$ 416.00	$ 523.00	$2,081.00

ASSIGNMENT OF ERRORS

3. Petitioner assigns the following errors which have been committed by respondent in the determination of an

estimated income tax.

3.A. Respondent has improperly proposed an addition to estimated income tax provided for by Title 26 U.S.C. Section 6651(a)(1).

3.B. Respondent has not proposed an addition to tax provided for by Title 26 U.S.C. Section 6653(a).

3.C. Respondent has erroneously determined interest due on an alleged underpayment of estimated income tax.

3.D. Respondent erroneously issued the attached notice of deficiency for an unpaid amount of estimated income tax.

STATEMENTS OF FACT

4. A Statement of facts, upon which petitioner bases the assignment of error, follows:

4.A. The exception to an addition to tax, provided for by I.R.C. Section 6651(a), is not limited to reasonable cause.

4.B. The addition to tax, provided for by I.R.C. Section 6653(a) is not presumed correct.

4.C. No interest is due on any unpaid portion or amount of estimated income tax.

4.D. Respondent erroneously determined to assess for an unpaid amount of estimated income tax.

Petitioner reserves the right to amend this petition as to those issues not hereinbefore mentioned.

WHEREFORE it is prayed that the attached notice of deficiency be in all respects be abated, and that petitioner be compensated for costs incurred therein.

Respectfully submitted,

Dated: 3-17-89

/s/
Frank W. Stamos
Petitioner

UNITED STATES TAX COURT

WASHINGTON, D.C.

LORNA D. STAMOS Petitioner, v. COMMISSIONER OF INTERNAL REVENUE Respondent.	Docket No. 5622-89

PETITION FOR REDETERMINATION

Lorna D. Stamos hereby petitions for redetermination, in abatement, of an alleged deficiency for estimated income tax including interest and additions to estimated tax stated therein, and as the basis for petitioner's cause, petitioner states and alleges as follows:

1. The petitioner in this case is Lorna D. Stamos whom resides at 1115 S. Church St., Lodi, California 95240.

2. The attached notice of deficiency was

apparently issued by Raymond Spillman, District Director of the Sacramento office of the Internal Revenue Service, State of California, for the years in the above entitled case which follows:

Year	Date Issued	Amount Alleged
1981	Dec. 29, 1988	$ 24,497.00
1982	Dec. 29, 1988	12,442.00
1983	Dec. 29, 1988	5,158.00
1984	Dec. 29, 1988	4,053.00

Additions to Tax

Year	§6651(a)(1)	§6653(a)(1)	§6654(a)	§6661(a)
1981	$ 6,124.00	$ 1,225.00	$ 1,877.00	$ 0.00
1982	$ 3,111.00	$ 622.00	$ 1,211.00	$3,110.00
1983	$ 1,290.00	$ 258.00	$ 315.00	$1,289.00
1984	$ 1,013.00	$ 203.00	$ 255.00	$ 0.00

ASSIGNMENT OF ERRORS

3. Petitioner assigns the following errors which have been committed by respondent in the determination of an

estimated income tax.

3.A. Respondent has erroneously determined a deficiency in estimated tax for petitioner.

3.B. Respondent has erroneously proposed an addition to tax, provided for by I.R.C. Section 6651(a), for the years ending 1981, 1982, 1983, and 1984.

3.C. Respondent has erroneously proposed an addition to tax, provided for by I.R.C. Section 6653(a), for years ending 1981, 1982, 1983, and 1984.

3.D. Respondent erroneously proposed an addition to tax, provided for by I.R.C. Section 6654(a), for years ending 1981, 1982, 1983, and 1984.

3.E. Respondent has erroneously proposed an addition to tax, provided for by I.R.C. Section 6661, for the years ending 1982, 1983, and 1984.

STATEMENTS OF FACT

4. A Statement of facts, upon which petitioner bases the assignment of error, follows:

4.A. Petitioner does not exercise substantial management and control of her husband's trade or business.

WHEREFORE it is prayed that the attached notice of deficiency be in all respects be abated, and that petitioner be compensated for costs incurred therein.

Respectfully submitted,

Dated: 3-17-89

/s/
Lorna W. Stamos
Petitioner

DEPARTMENT OF THE TREASURY

WASHINGTON

June 1, 1992

RE: 92-05-43

Mr. Frank W. Stamos
1115 South Church Street
Lodi, CA 95240

Dear Mr. Stamos:

This is in response to your Freedom of Information request dated April 27, 1992 addressed to this office.

You requested a certified copy of all revisions, amendments or cancellation of Treasury Department Order (TO) 120, "Continuous to Perform Functions," dated July 31, 1950. The following is a listing of certified documents that are being sent to you and their status.

TO 120, dated 07/31/50	Cancelled by TD 00-07, dated 02/10/92
TO 120, Amnd. 1, dated 02/29/52	Superseded by TO 120, Amnd. 2, dated 04/29/52

TO 120, Amnd. 2, dated 04/29/52	Rescinded
TO 120, Amnd. 3, dated 09/01/53	Superseded by TO 120, Amnd. 8, dated 08/31/54
TO 120, Amnd. 4, dated 11/27/53	Superseded by TO 120, Amnd. 6, dated 08/15/54
TO 120, Amnd. 5, dated 06/11/54	Superseded by TO 120, Amnd. 7, dated 08/11/54
TO 120, Amnd. 6, dated 08/15/54	Rescinded
TO 120, Amnd. 7, dated 08/11/54	Rescinded
TO 120, Amnd. 8, dated 08/31/54	Rescinded
TO 120, Amnd. 9, dated 07/27/55	Rescinded

Sincerely,

/s/
Robert T. Harper, Director
Office of Management Support Systems

Enclosures

DEPARTMENT OF THE TREASURY

Office of the Secretary

Treasury Department Order No. 120,
Amendment No. 9

Bureau of the Mint

Transfer of Functions within the
Bureau

By virtue of the authority vested in me by Reorganization Plan No. 26 of 1950, as an amendment of Treasury Department Order No. 120, dated July 31, 1950, I hereby transfer all of the functions of the Assayer of the United States Mint at San Francisco, California.

This amendment of Treasury Department Order No. 120 shall be effective August 1, 1955 and shall remain in effect until terminated by subsequent order.

/s/
Acting Secretary of the Treasury

Date: Jul 27, 1955

U.S. Department of Justice

Tax Division

Washington, D.C.20530

JAB:GRA:KWRosenberg
5-18299

March 4, 1992

FEDERAL EXPRESS

Cathy A. Catterson, Esquire
Clerk, U.S. Court of Appeals
for the Ninth Circuit
121 Spear Street
San Francisco, California 94119-3939

Re: Frank W. and Lorna D. Stamos v. Commissioner 9th Cir. No. 91-70121

Dear Ms. Catterson:

On January 6, 1992, appellants in the above-entitled case filed a motion therein styled "Motion to Overturn Agency Orders and Declare Appellees Action Void for Want of Jurisdiction." We filed no response at the time because we considered the arguments contained in the motion to be meritless on their face. In a letter to

this office, with a copy to the Clerk of this Court, dated February 27, 1992, appellants have asked our views on the motion. The Clerk's office has informed us that the motion is still pending. In light of these circumstances, we feel a brief response to appellants motion is warranted.

We would note at the outset that appellants' motion is in reality a supplemental brief in support of their position that the decision of the Tax Court in this case is erroneous. Neither the Federal Rules of Appellate Procedure nor this Court's local rules permit the filing of such a supplemental brief without leave of the Court. Appellants have not sought leave of the court and, moreover, have provided no explanation for their failure to raise in their briefs the

arguments advanced in their purported motion, which, as indicated, is actually a supplemental brief. Appellants' motion therefore should be denied as an improper attempt to file a supplemental brief.

In any event, the arguments advance in appellants' "motion" are patently without merit. Indeed, it appears that the motion is based on the erroneous assumption that regulations applicable to the Internal Revenue Code (26 U.S.C.) are found in Title 27 of the Code of Federal Regulations. The applicable regulations are found instead in Title 26 of the C.F.R. With regard to the filing of notices of tax liens against appellants' property, the Tax Court's docket entries reflect that no appeal bond was filed by appellants. The tax liabilities at issue may therefore be assessed and collected

during the pendency of their appeal as provided in the Code. See IRC §§ 6321, 7485; Barnes Theatre Ticket Service, Inc. v. Commissioner, 50 T.C. 28, 29 (1968), aff'd on other grounds, 408 F.2d 65 (2d Cir. 1969). Finally, Treasury Department Order No. 120 applies to all Treasury Department functions, not solely those relating to alcohol, tobacco, and firearms. See Tax Court opinion (CR 21) at 14 n. 20.

We have enclosed an original and four copies of this letter for distribution to the panel assigned to decide this case. We are also sending a copy of the letter to appellants, who are appearing pro se. This case is assigned to Kenneth W. Rosenberg of this office, who may be reached at FTS 368-1919 or (202) 514-1919.

Sincerely yours,

JAMES A. BRUTON
Acting Asst Attorney General
Tax Division

By: /s/
GARY R. ALLEN
Chief, Appellate Section
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044
(202) 514-3361 or FTS 368-3361

cc: Mr. Frank W. Stamos
Mrs. Lorna D. Stamos
1115 S. Church St.
Lodi, California 95240

RECEIVED
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JUL 20 1992

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK W. STAMOS & LORNA D. STAMOS, Petitioners/Appellants, v. COMMISSIONER OF INTERNAL REVENUE Respondent/Appellee	No. 91-70121 Tax Court Nos. 5621-89

APPELLANTS' MOTION AND BRIEF TO DISMISS FOR LACK OF JURISDICTION

COMES NOW APPELLANTS, Frank W. and Lorna D. Stamos, and hereby move this Court to dismiss the proceeding, taken in the Tax Court, for lack of jurisdiction premised upon newly discovered evidence, and declarations of appellants in support thereof. Appellants also assert that appellee has committed fraud upon this Court by intentionally withholding evidence as part of an unconscionable plan or scheme which successfully influenced the court in

its decision. See Abatti v. Commissioner of Internal Revenue, 859 F.2d 115 (9th Cir. 1988).

This motion is also made in relation to the Memorandum opinion of this Court, filed March 4, 1992, tacitly upholding the Tax Court's finding that Treasury Department Order (hereinafter referred to as "T.D.O.") 120 provides a specific general enforcement authority permitting appellee to determine a deficiency and issue appellants notice of same as discussed in appellee's letter memorandum to the Clerk of this Court, also dated March 4, 1992, of which a true and correct copy is attached hereto as Exhibit #1.

Appellee claims, on page 2 of the subject letter memorandum,

"Finally, Treasury Department Order No. 120 applies to all Treasury functins, not solely

those relating to alcohol, tobacco, and firearms. See Tax Court opinion (CR 21) at 14 n.20."

However, appellants are not responsible to the Superintendent of the United States Mint, San Francisco, California, to which the latest amendment to T.D.O. 120 applies:

By letter dated April 27, 1992, appellant Frank W. Stamos issued a Freedom of Information Act request (hereinafter referred to as "F.O.I.A." request) to the Department of the Treasury requesting certified copies of all revisions, amendments or cancellations of T.D.O. 120.

By letter dated June 1, 1992, appellant Frank W. Stamos received certified copies of T.D.O. No. 120, including all amendments thereto, from the Department of the Treasury as a result of his F.O.I.A. request dated April 27, 1992. A true and correct copy of

cover page, in response to appellants F.O.I.A. request, is attached hereto as Exhibit #2 in support hereof.

Appellants also hereby submit the certified copies of T.D.O. 120, and its amendments thereto, with this original motion and brief, and hereby submits true and correct copies thereof, appended to copies of this motion and brief as Exhibits #3-1 through #3-10.

According to the Department of the Treasury, by its letter dated June 1, 1992, addressed to appellant Frank W. Stamos (Exhibit 2); the last amendment, to T.D.O. 120 (Amendment 9), transferred all of the functions of the Assayer of the United States Mint at San Francisco, California, to the Superintendent of the United States Mint, San Francisco, California, and that T.D.O. 120 had been canceled by Department

of the Treasury Directive 00-07 dated February 10, 1992, of which a certified copy is attached to the original of this motion and brief, and true and correct copies thereto have been attached to copies of this brief and motion as Exhibits #4-1 through #4-47. The pertinent portion, referred to in this brief and motion can be found on Page I-14, and certification on Page II-11.

ARGUMENT

APPELLEE WITHHELD CERTAIN VITAL INFORMATION WHICH IMPAIRED THE ABILITY OF THIS COURT TO RENDER A PROPER DECISION IN RELATION TO THE OPINION OF THE TAX COURT

Appellee, in relation to the foregoing, intentionally withheld and misled this Court, as well as the Tax Court, as to it's general enforcement authority to determine and issue appellants notices of deficiency.

The application of T.D.O. No. 120, its

amendments thereto, and it's cancellation by said agency is entitled to great weight, see F.P. Baugh, Inc., v. Little Lake Lumber Company, 297 F.2d 692 (9th Cir. 1961).

The Department of the Treasury has determined, since the issuance of T.D.O. 120 (Amendment 9) was issued, that the notices of deficiency, issued to appellants, have nothing in common with the collection of revenue, see F.P. Baugh, Inc., v. Little Lake Lumber Company, **supra.**

Additionally, the Tax Court failed to show, in its findings of fact and conclusions of law, i.e. its opinion, where in the record appellants had been responsible to the Superintendent of the United States Mint, San Francisco, California.

Further appellants question the propriety of the memorandum of this Court,

filed March 4, 1992, which took a tacit position with the Tax Court also finding that somehow appellants had been responsible to the Superintendent of the United States Mint, San Francisco, California, without any evidence before the Court of same.

Since July 27, 1955, through February 10, 1992, T.D.O. No. 120, Amendment 9 thereto had been in effect upon which appellee had drawn it's authority to determine and issue appellants Frank W. and Lorna D. Stamos notices of deficiency in relations to their responsibility to the Superintendent of the United States Mint, at San Francisco, California.

CONCLUSION

In relation to the foregoing appellee has worked a fraud upon this Court in its intentional concealment of facts which would have changed the course of this Court's

decision.

Fraud on the court must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision. Abatti v. Commissioner of Internal Revenue, 859 F.2d 115 (9th Cir. 1988).

In this case appellee worked a fraud upon this Court by intentionally withholding the general specific authority, vested with the Superintendent of the United States Mint, located in San Francisco, California, by which appellee claims to have determined a deficiency and issued appellants notices of same!

PRAYER FOR RELIEF

Whereas appellee having committed a fraud upon this Court, appellants pray for the following relief:

1. That this Court find that appellee

has committed a fraud upon this Court;

2. That appellants are not responsible to the Superintendent of the United States Mint, located at San Francisco, California, upon which appellee has claimed an authority thereto for it's determination and issuance of notices of deficiency to appellants;

3. That this Court vacate it's judgment and enter judgment in favor of appellants finding that the Tax Court lacked jurisdiction in relation to the authority upon which appellee claims to have made a determination and issued notices of deficiency to appellants; and,

4. For such other relief as this Court deems appropriate, just, or proper.

//////////

//////////

//////////

Respectfully submitted

Dated July 16, 1992 /s/
Frank W. Stamos,
Appellant

Dated 7-16-92 /s/
Lorna D. Stamos,

1115 S. Church Street
Lodi, California 95240
(209) 334-5724

C E R T I F I C A T E O F S E R V I C E

It is hereby certified that service of this MOTION AND BRIEF TO DISMISS FOR LACK OF JURISDICTION and AFFIDAVITS FROM FRANK W. STAMOS and LORNA D. STAMOS IN SUPPORT thereof, has been made on attorney for the appellee, on this 17th day of July, 1992, by mailing same to him by first class mail addressed as follows:

GARY R. ALLEN
Chief, Appellate Section
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

/s/
Frank W. Stamos, Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK W. STAMOS & LORNA D. STAMOS,	)	No. 91-70121
	)	
Petitioners/Appellants,	)	Tax Court Nos.
	)	5621-89
v.	)	5622-89
	)	
COMMISSIONER OF INTERNAL REVENUE	)	
	)	
Respondent/Appellee	)	
	)	

AFFIDAVIT OF FRANK W. STAMOS IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

I, FRANK W. STAMOS, do hereby declare, under penalty of perjury:

1. That I am the appellant in the above-captioned proceeding, and that I am competent to testify if called upon to do so;

2. That appellee, by letter memorandum issued to this Court, dated March 4, 1992, claimed its general specific authority, to issue appellant a notice(s) of deficiency,

resides in Treasury Department Order No. 120;

3. That I issued a Freedom of Information Act request to the Department of the Treasury dated April 27, 1992, for certified copies of Treasury Department Order 120 and all amendments made thereto;

4. That I received, from the Department of the Treasury, a certified copy of Treasury Department Order 120 and all amendments thereto by cover letter dated June 1, 1992;

5. That Treasury Department Order 120, Amendment 9, was in effect at the time of appellee's determination, in the opinion of the Tax Court, and at the time of the filing of appellants appeal to this Court;

6. That I am not responsible to the Superintendent of the United States Mint located at San Francisco, California during

any of the years which is the subject matter of this litigation in relation to paragraph numbered 2 and 5 hereinabove.

7. That I am not liable to the United States as an individual responsible to the Superintendent of the United States Mint, located at San Francisco, California, from which appellee has determined and issued appellant Frank W. Stamos a notice(s) of deficiency in relation to paragraphs numbered 2 and 5 hereinabove;

FURTHER DECLARER SAYS NOT.

Dated July 16, 1992 /s/
Frank W. Stamos,
Appellant

This instrument subscribed before me, a Notary Public for the State of California County of San Joaquin, on this 16th day of July, 1992.

S E A L /s/
Idella Mae Reed,
Notary Public

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK W. STAMOS & LORNA D. STAMOS,	)	No. 91-70121
	)	
Petitioners/Appellants,	)	Tax Court Nos.
	)	5621-89
v.	)	5622-89
	)	
COMMISSIONER OF INTERNAL REVENUE	)	
	)	
Respondent/Appellee	)	
	)	

AFFIDAVIT OF LORNA D. STAMOS IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

I, LORNA D. STAMOS, do hereby declare, under penalty of perjury:

1. That I am the appellant in the above-captioned proceeding, and that I am competent to testify if called upon to do so;

2. That appellee, by letter memorandum issued to this Court, dated March 4, 1992, claimed its general specific authority, to issue appellant a notice(s) of deficiency,

resides in Treasury Department Order No. 120;

3. Than Appellant Frank W. Stamos received, from the Department of the Treasury. a certified copy of Treasury Deparment Order 120 and all amendments thereto by cover letter dated June 1, 1992;

4. That Treasury Department Order 120, Amendment 9, was in effect at the time of appellee's determination, in the opinion of the Tax Court, and at the time of the filing of appellants appeal to this Court;

5. That I am not responsible to the Superintendent of the United States Mint located at San Francisco, California during any of the years which is the subject matter of this litigation in relation to paragraph numbered 2 and 4 hereinabove;

6. That I am not liable to the United States as an individual responsible to

the Superintendent of the United States Mint located at San Francisco, California, from which appellee has determined and issued appellant Lorna D. Stamos a notice(s) of deficiency in relation to paragraphs numbered 2 and 4 hereinabove;

FURTHER DECLARER SAYS NOT.

Dated 7-16-92

/s/
Lorna D. Stamos,
Appellant

This instrument subscribed before me, a Notary Public for the State of California County of San Joaquin, on this 16th day of July, 1992.

S E A L

/s/
Idella Mae Reed,
Notary Public

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
121 Spear Street, P.O. Box 193939
San Francisco, CA 94105-3939

July 21, 1992

TO: Frank W. & Lorna Stamos

FROM: Clerk's Office, U.S. Court of Appeals for the Ninth Circuit
By: Christine Hill, Deputy Clerk

RE: USCA No. 91-70121 Stamos v. CIR

We are in receipt of your recent transmittals to this office, dated June 23 & July 16, 1992.

I am returning your motion to dismiss for lack of jurisdiction, because your case was closed on March 4, 1992 and your motion is moot.

Enclosed is a copy of the courts Memorandum filed on March 4, 1992, also a copy of the Judgment and the Mandate cover letter.